Supreme Court, U. S.
FILED
AUG 11 1975
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

NO. 75-13

ROBERT I. FERGUSON,
PETITIONER

VS.

STATE OF ALABAMA,
RESPONDENT.

BRIEF AND ARGUMENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF ALABAMA AND APPENDICES

WILLIAM J. BAXLEY
Attorney General of Alabama

WALTER S. TURNER
Chief Assistant Attorney General
of Alabama

SARAH M. GREENHAW
Assistant Attorney General
of Alabama

COUNSEL FOR RESPONDENT

INDEX

SUBJECT INDEX

	Page
TABLE OF CASES	ii
TABLE OF STATUTES	iii
TABLE OF APPENDICES	iv
OPINIONS OF THE COURTS BELOW	1-2
JURISDICTION	2
QUESTIONS PRESENTED FOR REVIEW	2
CONSTITUTIONAL PROVISIONS INVOLVED	2
STATEMENT OF THE CASE	2-3
REASONS FOR DENYING THE WRIT	3-7
CONCLUSION	7-8
APPENDICES	10-27
CERTIFICATE OF SERVICE	28

TABLE OF CASES

	Page
Adickes v. Kress & Co., 398 U.S. 144, 26 L. Ed. 2d 142, 90 S. Ct. 1598	7
Albert v. State, 274 Ala. 579, 150 So. 2d 198	5
Brown v. Allen, 344 U.S. 433, 97 L. Ed. 469, 75 S. Ct. 397	6
Clark v. Commonwealth of Pennsylvania, 128 U.S. 395, 32 L. Ed. 487, 9 S. Ct. 111	7
Hadley v. State, 288 Ala. 293, 259 So. 2d 853, cert. den. 409 U.S. 937, 34 L. Ed. 2d 190, 93 S. Ct. 245	5
Hoyt v. Utah, 114 U.S. 488, 29 L. Ed. 183, 5 S. Ct. 972	7
King v. Wainwright, 368 Fed. 2d 57, Cert. den. 389 U.S. 995, 19 L. Ed. 2d 492, 88 S. Ct. 499	6
McDaniel v. State, 39 Ala. App. 157, 96 So. 2d 319	5
Plassett v. Page, 439 Fed. 2d 770	6
Relf v. State, 267 Ala. 3, 99 So. 2d 216	5
Seals v. State, 282 Ala. 586, 213 So. 2d 645	6
Williams v. State, 52 Ala. App. 207, 290 So. 2d 668, cert. den. 293 Ala. ——, 290 So. 2d 672	7

TABLE OF STATUTES

	Page
Title 7, Section 827(1), Code of Alabama 1940, Recompiled 1958	4
Title 7, Section 827(1a), Code of Alabama 1940, Recompiled 1958	4
Title 7, Section 827(4), Code of Alabama 1940, Recompiled 1958	4
Title 15, Sections 318 (1) - 318(12), Code of Alabama 1940, Recompiled 1958, Cumulative Supplement	3
Title 15, Sections 380(14) - 380(25), Code of Alabama 1940, Recompiled 1958, Cumulative Supplement	3

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TABLE OF APPENDICES

	Page
Appendix A—Title 7, Sections 827(1), 827(1A) and 827(4), Code of Alabama 1940, Recompiled 1958	10-12
Appendix B—Title 15, Sections 318(1) - 318(12), Code of Alabama 1940, Recompiled 1958, Cumulative Supplement	13-17
Appendix C—Title 15, Sections 380(14) - 380(25), Code of Alabama 1940, Recompiled 1958, Cumulative Supplement	18-27

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BRIEF AND ARGUMENT FOR RESPONDENT

OPINIONS OF THE COURTS BELOW

The opinion of the Court of Criminal Appeals of Alabama is reported as follows:

Ferguson v. State,
54 Ala. App. ——,
313 So. 2d 561 (1975)

The Supreme Court of Alabama denied certiorari and this opinion is reported as follows:

Ferguson v. State,
293 Ala. ——.
313 So. 2d 564 (1975)

JURISDICTION

The petitioner has applied to this Honorable Court for a writ of certiorari to review the judgment of the Court of Criminal Appeals of Alabama which was rendered on March 4, 1975, and to review the order of the Supreme Court of Alabama denying a petition for certiorari entered on May 8, 1975.

Petitioner applies for this writ of certiorari under the provisions of 28 U.S. C. 1257(3).

QUESTIONS PRESENTED FOR REVIEW

1. Whether a non-indigent, represented by retained counsel on appeal, is denied equal protection and due process as guaranteed by the Constitution of the United States by having his appeal dismissed for failure to timely file the transcript of the evidence?

CONSTITUTIONAL PROVISIONS INVOLVED

The Fourteenth Amendment to the Constitution of the United States.

STATEMENT OF THE CASE

Petitioner was convicted of grand larceny on October 30, 1973, and on the same day gave notice of appeal. On November 30, 1973, petitioner filed a motion for new trial, which was continued until February 5, 1974, at which time it was denied.

On June 26, 1974, the transcript was filed with the circuit clerk. No extensions of time were requested for filing the transcript with the circuit clerk. On November 25, 1974, the record was filed in the Alabama Court of Criminal Appeals. Extensions of time for filing the record in the Court of Criminal Appeals were granted on September 3, 1974 and September 26, 1974. The Respondent filed a motion to strike the transcript of the evidence on the ground that the transcript of evidence had not been filed with the circuit clerk within sixty days from the day upon which appeal was taken or from the day upon which the motion for new trial was denied.

The Court of Criminal Appeals granted the motion and the Supreme Court of Alabama denied the petition for writ of certiorari to the Court of Criminal Appeals.

Petitioner was represented by a retained counsel both at trial and on appeal.

REASONS FOR DENYING THE WRIT

Respondent certainly agrees with petitioner that access to the courts must be made equally available to all without regard to financial status. And the State of Alabama has sought to do this by enacting certain statutes, Title 15, Sections 318(1) - 318(12) and Title 15, Sections 380(14) - 380(25), Code of Alabama 1940, Recompiled 1958, Cumulative Supplement. These statutes provide an indigent with an attorney for trial, an attorney on appeal and a free transcript on appeal.

In the instant case petitioner had a retained attorney for the trial of his case and on appeal he had a retained attorney and a transcript of the proceedings. Petitioner was not denied equal protection of the law.

And the fact that the transcript of the evidence was stricken and the appeal affirmed because of failure to file timely does not deny petitioner of any of his constitutional rights.

Sections 827(1) and 827(4), Title 7, Code of Alabama 1940, Recompiled 1958, provide that the transcript of evidence must be filed within the circuit clerk's office within sixty days of the taking of an appeal or of the court's ruling on a motion for a new trial, whichever is later. Although the trial court may grant an extension of time for filing the transcript, Section 827(1a), there was not a request for an extension in this case.

In the instant case, petitioner gave notice of appeal on October 30, 1973. The record in this case also includes a certificate stating that notice of appeal was given on February 5, 1974. Title 15, Section 368, Code of Alabama 1940, Recompiled 1958, provides:

> "Appeals in criminal cases must be taken at the time of sentence or confession of judgment, or within six months thereafter in manner following: (a) An entry of record that defendant appeals from the judgment with or without suspension of judgment, as he may elect, to be taken at the time of judgment rendered, or, (b) the filing of a written statement signed by the defendant or his attorney that defendant appeals from the judgment the statement to be filed within six months; provided, however, that the trial court shall retain jurisdiction of the cause for the purpose of hearing and determining a motion for a new trial, seasonably made, and any appeal from a judgment of conviction shall also raise the question of the correctness of the court's ruling on a motion for a new trial made within the time allowed, and in the manner prescribed by law."

An appeal is taken within the meaning of the statute, when the record shows that defendant has expressed a desire to appeal and is deemed perfected if the defendant upon rendition of a judgment expresses a desire to appeal. *Relf v. State*, 267 Ala. 3, 99 So. 2d 216. *Albert v. State*, 274 Ala. 579, 150 So. 2d 198. Thus, any later compliance with subsection (b) of Title 15, Section 368, Code, is ineffectual. See *Relf v. State*, supra.

The motion for new trial was denied on February 5, 1974. The transcript was filed with the Clerk of the Circuit Court of Washington County, Alabama, on June 26, 1974, which is more than sixty days from the date of taking the appeal or the date the motion for new trial was denied.

It clearly appears that Sections 827(1)(4), supra, were not complied with. When the transcript is not timely filed with the circuit clerk in accordance with the above statute, then a motion to strike the transcript of the testimony will be granted and the case dismissed. *Hadley v. State*, 288 Ala. 293, 259 So. 2d 853, cert denied 409 U.S. 937, 34 L. Ed. 2d 190, 93 S. Ct. 245; *Albert v. State*, supra; *McDaniel v. State*, 39 Ala. App. 157, 96 So. 2d 319.

This has long been the rule in this State. It is necessary to have time limits for the filing of transcripts, otherwise

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it may be years in some instances before a case reaches an appellate court. This would be unfair to all parties involved.

And this Court has stated its approval of such limitations. In *Brown v. Allen*, 344 U.S. 433, 97 L. Ed. 469, 75 S. Ct. 397, the statement of the case was one day late. This Court held that defendants were not deprived of a constitutional right by the State Supreme Court's refusal to review the case after failure to perfect the appeal. This Court then stated that a period of limitations accords with its conception of proper procedure.

The dismissal of petitioner's case did not deny him equal protection or due process of the law. Federal courts have recognized that there is a difference in being represented by court-appointed counsel and being represented by retained counsel on appeal. A mistake by retained counsel in perfecting an appeal does not constitute a denial of due process. See *King v. Wainwright*, 368 Fed. 2d 57 (5th Cir. 1966), cert. denied 389 U.S. 995, 19 L. Ed. 2d 492, 88 S. Ct. 499 and *Plasett v. Page*, 439 Fed. 2d 770 (10th Cir. 1971).

In this State it is the duty of counsel for appellant to see that records pertaining to appeals are timely filed. *Seal v. State*, 282 Ala. 586, 213 So. 2d 645 (1968). Not only may the trial court grant an extension of time for the filing of the transcript, but may also grant an extension after the expiration of the sixty-day period.

Petitioner claims that he was indigent from October 30, 1973, the time of conviction, until June 7, 1974, and that his indigency was known to a responsible State official, namely, the court reporter. Petitioner filed affidavits and exhibits in support of this claim with the Court of Criminal Appeals. However, there is absolutely nothing in either the affidavits

or exhibits to indicate that the court reporter was aware of petitioner's financial status. Petitioner does not state in his affidavit that he advised the court reporter of his indigency, nor does he state that he even personally contacted or talked to the court reporter. Certainly, there is no allegation in the affidavit that the court reporter knew he was indigent.

Moreover, appellate courts in this jurisdiction are bound by the record and such record may not be supplemented, impeached, or contradicted by affidavits or exhibits. *Williams v. State*, 52 Ala. App. 207, 290 So. 2d 668, cert. denied 293 Ala. ——, 290 So. 2d 672. And this Honorable Court also adheres to the rule that affidavits or statements, not a part of the proceedings below, cannot be considered in the disposition of a case. *Hoyt v. Utah*, 114 U.S. 488, 29 L. Ed. 183, 5 S. Ct. 972; *Clark v. Commonwealth of Pennsylvania*, 128 U.S. 395, 32 L. Ed. 487, 9 S. Ct. 111; *Adickes v. Kress & Co.*, 398 U.S. 144, 26 L. Ed. 2d 142, 90 S. Ct. 1598.

Thus, the appellate courts in this State could not and did not consider the affidavits and/or exhibits.

CONCLUSION

Respondent submits that a non-indigent is not denied due equal protection of the law if the transcript of the evidence is stricken. If one retains an attorney on appeal then it is his his responsibility to see that a transcript is obtained and that records are timely filed. However, when a defendant is indigent the burden is on the State to see that he is provided with a transcript.

The failure to perfect petitioner's appeal was not due to any action or inaction on the part of the State officials. The

responsibility of perfecting the appeal rested on retained counsel.

For all of the foregoing reasons, respondent submits that petitioner was properly convicted and that none of his constitutional rights were violated. And, therefore, the writ of certiorari prayed for in this cause should be denied.

Respectfully submitted,

WILLIAM J. BAXLEY
Attorney General of Alabama

WALTER S. TURNER
Chief Assistant Attorney General
of Alabama

SARAH M. GREENHAW
Assistant Attorney General
ATTORNEYS FOR RESPONDENT

APPENDIX A

TITLE 7, SECTIONS 827(1), 827(1a), and 827(4), 1940 CODE OF ALABAMA (RECOMPILED 1958)

§ 827(1). **Bills of exception abolished in certain courts; transcript of evidence.**—Bills of exception in the trial of cases at law in the circuit court and courts of like jurisdiction and all other courts of record having a full time court reporter and from which appeals lie directly to the court of appeals or the supreme court of Alabama, in the state of Alabama, are hereby abolished. If a party to a cause tried in such court desires to appeal from a judgment rendered, he shall, within five days after he perfects his appeal give notice to the court reporter, in writing, that he desires to appeal and request the evidence to be transcribed. The court reporter shall then promptly transcribe the evidence, including objections, oral motions, rulings of the court, and the oral charge of the court, certify the same and file it with the clerk within sixty days from the date on which the appeal was taken, or within sixty days from the date of the court's ruling on the motion for a new trial, whichever date is later. He shall also identify and copy all documents offered in evidence in the order in which offered. The evidence so transcribed and certified and filed shall be a part of the record, and assignments of error may be made as though the transcript constituted a bill of exceptions. If the reproduction of documents offered in evidence, such as maps or photographs, be difficult or impracticable, the court reporter shall so certify, and the clerk shall thereupon attach the original, or a photostatic copy thereof, to the transcript on appeal, and such original or photostatic copy thereof shall be a part of the transcript on appeal. If bulky or heavy objects be offered in evidence as exhibits which are not capable of being attached to the transcript, the court reporter shall certify

that such exhibits are bulky or heavy objects which are not capable of being attached to the transcript; that he has identified them as part of the transcript on appeal. The court reporter shall include in his certificate a statement that he has notified both parties or their attorneys of record of the filing of the transcript of testimony. (1943, p. 423, § 1, effective Sept. 1, 1943; 1951, p. 1527, § 1, appvd. Sept. 12, 1951; 1956; 1st Ex. Sess., p. 143, § 1, appvd. Feb. 9, 1956.)

§ 827(1a). **Extension of time for filing transcript; objections to ranscript; hearing and rulings thereon.**—The period of time within which the reporter must file the transcript may be extended by the trial court for cause. Within ten (10) days after the filing with the clerk of the certified transcript by the court reporter, either party may file with the clerk objections to the certified transcript, with his certificate that he has notified the opposing party, or attorney of record, that the same will be called to the attention of the trial court at a specified time and place. If no objections are filed within such ten (10) days the transcript shall be conclusively presumed to be correct. The hearing of objections and the ruling of the court thereon shall be concluded within a period of ninety (90) days from the date of the taking of the appeal, provided that this period may be extended by the trial court for cause. The trial court shall endorse its ruling on the transcript, sign the same, all within said ninety (90) days period, except as hereinbefore provided. Any ruling of the trial court upon such requested hearing, as well as any ruling on objections to a succinct statement, provided for in section 827(3) of this title, shall be reviewable, with error duly assigned by the dissatisfied party upon the appeal of the cause, and the evidence upon such hearing shall be duly certified by the court reporter. (1951, p. 1528, § 2, appvd. Sept. 12, 1951.)

§ 827(4). Time for filing transcript or statement.—The court reporter's certified transcript shall be filed with the clerk within sixty days from the date of the taking of the appeal or within sixty days from the date of the court's ruling on the motion for a new trial, whichever date is later; and any succinct statement of the evidence made in lieu of such transcript, as authorized in section 827(3) hereof, shall be filed with the clerk within sixty days from the date of the taking of the appeal, or within sixty days from the date of the court's ruling on the motion for a new trial, whichever date is later. Provided, that this period may be extended by the trial court for cause. (1943, p. 424, § 4, effective Sept. 1, 1943; 1951, p. 1529, § 6, appvd. Sept. 12, 1951; 1956, 1st Ex. Sess., p. 144, § 2, appvd. Feb. 9, 1956.)

APPENDIX B

TITLE 15, SECTIONS 318(1) - 318(12),
1940 CODE OF ALABAMA, (RECOMPILED 1958)
CUMULATIVE SUPPLEMENT

§ 318(1). What trial judge to ascertain before arraignment in noncapital case.—In all noncapital criminal cases wherein a defendant is charged with a serious offense in the circuit court, or court of like jurisdiction, or courts wherein the law provides a direct appeal to the supreme court or court of appeals to review such criminal proceedings, the trial judge shall before arraignment ascertain from the accused, or otherwise:

1. Whether or not defendant has arranged to be represented by and have the assistance of counsel.

2. Whether or not defendant desires the assistance of counsel.

3. Whether or not defendant is able financially or otherwise to obtain the assistance of counsel. (1963, p. 1136, § 1, appvd. Sept. 16, 1963.)

§ 318(2). Appointment of counsel for trial in such case.—If it appears to the trial court that such defendant is charged with a serious criminal offense and does not expressly waive the right to assistance of counsel, and is not able financially or otherwise to obtain the assistance of counsel, said court shall appoint counsel to represent and assist defendant and it shall be the duty of such counsel as an officer of the court and as a member of the bar to represent and assist said defendant. (1963, p. 1136, § 2, appvd. Sept. 16, 1963.)

§ 318(3). Compensation of counsel appointed for trial.—Counsel appointed in such cases shall be entitled to receive for their services a fee to be fixed by the trial court not to exceed $100.00 per case.

Within a reasonable time after the conclusion of the trial or ruling on a motion for a new trial, or after an acquittal or other judgment disposing of the case, counsel shall submit to the trial court a bill for services rendered not to exceed the amount herein provided and such bill, if approved by the trial court, shall be submitted by the clerk of the court to the state comptroller for audit and allowance and if approved by the comptroller forwarded to the state treasurer for payment. (1963, p. 1136, § 3, appvd. Sept. 16, 1963.)

§ 318(4). **Appointment of counsel for appeal.**—In all criminal cases wherein a defendant has been convicted of a serious offense in which an appeal lies directly to the supreme court or court of appeals, and if said defendant expresses his desire to appeal said conviction, the court shall cause to be entered upon its minutes a recital of notice of appeal. The court shall then ascertain and make findings in reference to the appeal concerning those items listed as 1, 2, and 3 in section 318(1) of this title.

If it appears that defendant desires to appeal and is unable financially or otherwise to obtain the assistance of counsel on appeal and defendant expresses the desire for assistance of counsel the trial court shall appoint counsel to represent and assist defendant on appeal. The presiding judge of the court to which the appeal is taken shall have authority to appoint counsel in the event the trial court fails to appoint, and in the event it becomes necessary to further provide for counsel. It shall be the duty of such counsel as an officer of the court and as a member of the bar to represent and assist said defendant in the appeal. (1963, p. 1136, § 4, appvd. Sept. 16, 1963.)

§318(5). **Compensation of counsel appointed for appeal.**—Counsel appointed for the appeal shall be entitled to receive for their services a fee to be fixed by the appellate

court not to exceed $150.00 per case. Within a reasonable time after the disposition of the appeal, counsel shall submit to the appellate court a bill for services rendered, not to exceed the amount herein provided and such bill, when approved by the presiding judge or chief justice of the appellate court, shall be submitted by the clerk of the appellate court to the state comptroller for audit and allowance and if approved by the comptroller forwarded to the state treasurer for payment. (1963, p. 1137, § 5, appvd. Sept. 16, 1963.)

§ 318(6). **Appointment of counsel in certain proceedings involving life and liberty.**—In proceedings filed in the circuit court, or courts of like jurisdiction, or courts wherein a direct appeal lies to the supreme court or court of appeals, involving the life and liberty of those charged with or convicted of serious criminal offenses, including proceedings for habeas corpus and coram nobis or other post conviction remedies, and in appeals, applications for leave or review in such proceedings, the trial or presiding judge or chief justice of the court in which such proceedings may be commenced or pending may appoint counsel to represent and assist those persons so charged or convicted if it appears to the court that the person charged or convicted is unable financially or otherwise to obtain the assistance of counsel and desires the assistance of counsel and it further appears that counsel is necessary in the opinion of such judge to assert or protect the rights of such person. It shall be the duty of such counsel as herein provided to represent and assist said person in said proceeding. (1963, p. 1137, § 6, appvd. Sept. 16, 1963.)

§ 318(7). **Compensation of counsel appointed in such cases.**—Counsel appointed in such proceedings shall be entitled to receive for their services a fee to be fixed by the judge appointing him not to exceed $100.00 per case to be

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submitted, approved and paid in the same manner as hereinabove provided. (1963, p. 1137, § 7, appvd. Sept. 16, 1963.)

Quoted in Ex parte Anderson, 42 Ala. App. 294, 161 So. 2d 507 (1964).

§ 318(8). Ascertaining fact of indigency.—In ascertaining the fact of indigency as required by sections 318(1)-318(11) of this title the judge in said proceeding may order the sheriff, the solicitor, parole or probation officers, or the department of pensions and security, to make investigation and file a report with the court. (1963, p. 1137, § 8, appvd. Sept. 16, 1963.)

Quoted in Ex parte Anderson, 42 Ala. App. 294, 161 So. 2d 507 (1964).

§ 318(9). Schedule and recommendations of bar associations to be considered.—In making appointments of cuonsel and in fixing or approving the amount of the fees of counsel for services rendered, the judge or court shall take into consideration any schedule or recommendations of the county or state bar association. (1963, p. 1138, § 9, appvd. Sept. 16, 1963.)

§ 318(10). Authority of courts or judges to make rules.—Courts or judges having authority under sections 318(1)-318(11) of this title may adopt and promulgate such rules not in conflict with rules of the supreme court as may be necessary and proper to carry out the provisions of such sections and such rules when adopted shall have the force and effect of law. (1963, p. 1138, § 10, appvd. Sept. 16, 1963.)

§ 318(11). Annual appropriations and expenditures therefrom.—There is hereby appropriated annually out of the general fund in the state treasury the sum of thirty-five thousand ($35,000) dollars to carry out the purposes of section 318(1)-318(11) of this title.

Expenditures from this appropriation shall be subject to the approval of the governor and the condition of the general fund. The governor shall from time to time determine the condition of the said general fund and whether or not such expenditures can reasonably be made. (1963, p. 1138, § 11, appvd. Sept. 16, 1963.)

§ 318(12). Assessment of counsel fees as court costs in certain cases.—Whenever a court appoints counsel for a defendant in a criminal case as authorized or provided for by law, the court may, in its discretion, if the defendant is convicted, award his counsel a reasonable fee for his service which shall be assessed as a part of the costs in the case, to be collected as other costs. Provided, that the state of Alabama shall not be required to pay counsel fees in criminal cases except as provided in Act No. 526, S. 352, approved September 16, 1963 (Acts 1963, v. 2, p. 1136) [sections 318(1) to 318(11) of this title].

In determining the amount of fee to be allowed counsel under this section, the court shall consider customary fees in the community for similar services, the time spent by counsel on the case, counsel's experience in such cases, the skill displayed by counsel, difficulty of defense, any agreement as to fees which may exist between the counsel and defendant, and such other factors as the court deems relevant. (1967. Ex. Sess., p. 229, appvd. May 10, 1967.)

APPENDIX C

TITLE 15, SECTIONS 380(14)-380(25),
1940 CODE OF ALABAMA, (RECOMPILED 1958)
CUMULATIVE SUPPLEMENT

§ 380(14). **Purpose of sections 380(14)-380(25).**—The legislature is aware that it has become settled law that a state may or may not authorize appeals from judgments of convictions in criminal cases, and certain other related proceedings involving the life, liberty or property of a person convicted of a criminal offense. Further, that if a state does provide for appeals in criminal cases and such other cases, defendants or petitioners adjudged guilty of crimes and who are without funds and unable to pay the fees of the court reporter for transcribing the evidence, or the fees of the clerk for preparing the record, for review on appeal may be denied equal protection of the law or due process of law. It is the purpose of sections 380(14)-380(25) of this title to provide such defendants or petitioners with a transcript of the evidence or a part thereof and a record for a proper and equal review in certain criminal cases and such other cases wherein it is made to appear that a convicted defendant is indigent and desires to take an appeal and obtain a judicial review of matters that occurred at his trial, or hearing. (1961, Ex. Sess., p. 1930, § 1, appvd. Sept. 15, 1961; 1963, p. 1129, §1, appvd. Sept. 16, 1963.)

§ 380(15). **Application of sections 380(14)-380(25).**—Sections 380(14)-380(25) of this title shall apply to all criminal cases tried in the courts of the state of Alabama where a direct appeal to the supreme court or court of appeals is provided by law; also to all related or collateral proceedings, including habeas corpus and coram nobis proceedings, involving the life, liberty or property of a person convicted

of a criminal offense where an appeal is provided to the supreme court or court of appeals. (1961, Ex. Sess., ?????

§ 380(16). **Verified petition of indigent convicted person for transcript.**—In such criminal cases where the defendant has been adjudicated guilty by the trial court he may, if no motion for a new trial is filed, within ten days after the last day on which a motion for a new trial could have been filed, or within ten days after the ruling of the trial court upon a motion for a new trial, duly filed and ruled on adversely to defendant, file with the clerk or the trial judge of the court wherein such defendant was adjudicated guilty and sentenced, a petition in writing, sworn to and subscribed by said defendant, stating that defendant desires to take an appeal under the provisions of sections 380(14)-380(25) of this title. Such petition must identify the style of the case, the offense for which defendant was convicted, the plea made by the defendant, the date of the adjudication of guilt and the sentence and the punishment therefor, and the name of the court imposing such punishment, together with the name of the trial judge. Such petition shall also contain the full name of the defendant, together with a statement that he desires to appeal either from the judgment of conviction or from the adverse ruling on the motion for a new trial, or both. Such petition must contain an averment that the defendant is without sufficient funds, and has no reasonable way to procure the same, to pay the court reporter all of his lawful fees for transcribing the evidence and other proceedings had at the trial of said cause, or the fees of the clerk for preparing the record. In such other cases, including habeas corpus and coram nobis, which are related or collateral proceedings to a conviction of a criminal offense, and which proceedings involve the life, liberty or property of a person convicted of a crime, the person convicted may within ten days after a judgment or order dis-

posing of the proceedings adversely to said person file with the clerk or the trial judge of the court making said order a similar petition describing and identifying the proceeding; and stating the desire of the petitioner to appeal under the provisions of sections 380(14)-380(25) of this title. (1961, Ex. Sess., p. 1931, § 3, appvd. Sept. 15, 1961; 1963, p. 1130, § 3, appvd. Sept. 16, 1963.)

§ 280(17). **Same; averments as to errors at trial.**—The sworn petition must aver facts stated with particularity of errors in the proceedings in the trial court which are claimed by the defendant or petitioner as a basis for the appeal. (Such averments of error need not be expressed in any technical form, but must clearly indicate what is intended thereby.) If the defendant or petitioner alleges that the evidence is insufficient to support the verdict or adjudication of guilt, or other judgment or order of the court, the statement must contain averments of fact, stated with particularity, describing the area in which the evidence is lacking. (1961, Ex. Sess., p. 1931, § 4, appvd. Sept. 15, 1961; 1963, p. 1131, § 4, appvd. Sept. 16, 1963.)

§ 380(18). **Hearing on petition; investigation of petitioner's finances.**—Upon the filing of the petition with the clerk or the trial judge within the time prescribed herein, the trial judge shall have the defendant or petitioner brought before him and shall examine the defendant or petitioner under oath concerning the required averment in the petition that the defendant or petitioner is without sufficient funds, and has no reasonable way to procure the same, to pay the court reporter all of his lawful fees for transcribing the evidence and other proceedings had at the trial or on the hearing of said cause or the fees of the clerk which will accrue on appeal. The trial court at such hearing may issue subpoenas for witnesses as deemed necessary and may call upon

the sheriff, the solicitor, and other officers of the court to ascertain information relevant to the financial condition and ability of defendant or petitioner. The trial judge shall find from the court reporter or reporters who took stenographic notes at the trial or hearing a general estimate of the costs of transcribing the evidence and other proceedings occurring at the trial or such part thereof as may be necessary to be transcribed to afford the appellate court with a record of sufficient completeness as a basis for a fair review of the points insisted upon by defendant or petitioner, and shall also ascertain from the clerk a general estimate of the amount of fees which will be due to said clerk incident to an appeal.

The trial court either before, after, or during said hearing may designate a probation officer of the court or may designate the county department of pensions and security to make inquiry and ascertain facts concerning the financial condition and ability of defendant or petitioner, and it shall be the duty of such agencies to investigate and file a written report of its findings with the trial judge. Such report shall state with certainty any and all sources from which defendant or petitioner could be expected to obtain financial aid to pay such fees. (1961, Ex. Sess., p. 1932, § 5, appvd. Sept. 15, 1961; 1963, p. 1131, § 5, appvd. Sept. 16, 1963.)

§ 380(19). **Findings as to petitioner's ability to pay for transcript.**—If the trial judge is satisfied that the defendant or petitioner is without sufficient funds, and has no reasonable way to procure the same, necessary for the payment of court reporters' fees or the clerks' fees, he shall cause said finding to be entered on the minutes of the court. If the trial judge finds to the contrary, he shall also cause said findings to be entered on the minutes of the court, stating his reasons therefor. If the trial judge finds that the defendant or petitioner is unable to pay all of the court reporter's fees, or all

of the clerk's fees, but is able to pay a part, he shall cause to be entered upon the minutes of the court such finding and shall state his reasons therefor and state the amount in money that defendant or petitioner can reasonably pay. The burden shall be upon the convicted defendant or petitioner to satisfy the trial judge that said defendant or petitioner is without said sufficient funds, and has no reasonable way to procure the same. If the trial judge is in doubt after such investigation as he deems proper, he shall deny such petition in whole or in part and state his reasons therefor, and cause the same to be entered on the minutes of the court. (1961, Ex. Sess. p. 1932, § 6, appvd. Sept. 15, 1961; 1963 p. 1132, § appvd. Sept. 16, 1963.)

§ 380(20). Orders that transcript be prepared and that all or part of fees be paid by state.—If it appears to the trial court after full investigation that the defendant or petitioner is without sufficient funds, and has no reasonable way to procure same, to pay the court reporter all of his lawful fee for transcribing the evidence, and other proceedings had at the trial, or the fees of the clerk incident to an appeal, or that defendant or petitioner has reasonably available to him only enough funds to pay a part of such fees, he shall make and enter an order requiring the court reporter to transcribe all or such parts of evidence of the proceedings occurring at the trial that may be necessary to afford the appellate court a record of sufficient completeness for review and shall order the clerk to prepare the record for appeal. The trial court shall at said time make and enter an order authorizing the payment of a sum certain to the court reporter of all or a part of his estimated fees calculated at the rate provided by law upon the completion and delivery of a transcript and three carbon copies thereof, duly certified and filed with the clerk, one of said carbon copies to be delivered by

the clerk to the defendant or petitioner. The court shall also at said time make and enter an order authorizing the payment of a sum certain to the clerk of all or a part of his estimated fees incident to the appeal. Such order shall not be made unless and until the defendant or petitioner has paid to the court reporter and to the clerk that part of the amount due the court reporter and the clerk which the court has found must be borne by defendant or petitioner, and the defendant or petitioner shall furnish to the court satisfactory evidence of such payment. The trial court shall cause a certified copy of such order to be delivered to the court reporter and to the clerk and upon filing of said transcript and three carbon copies thereof by the court reporter with the clerk of the trial court and the complete preparation of the record on appeal by the clerk, the clerk shall transmit such order to the state comptroller, whereupon the state comptroller shall cause to be paid to the court reporter and to the clerk out of the general funds in the state treasury, not otherwise appropriated, the amount of said fees. (1961, Ex. Sess., p. 1933, § 8, appvd. Sept. 15, 1961; 1963, p. 1132, § 7. appvd. Sept. 16, 1963.)

§ 380(21). Application of sections 380(14)-380(25) to pending appeals and cases.—All appeals presently pending in the supreme court of Alabama and in the court of appeals of Alabama on the effective date of sections 380(14)-380(25) of this title, in which a request for a free transcript of the evidence is contained in the record and in which no transcript of the evidence appears, may be remanded to the trial courts from which such appeals were taken for proceedings pursuant to the provisions of such sections. Such proceedings shall not be dismissed in the trial court because of the failure of the defendant or petitioner to request an appeal and transcript within the time and in the manner required herein, but the

trial court shall cause the defendant or petitioner to be notified of the remandment of the cause and of his opportunity to file a petition as provided in such sections. Such defendants or petitioners may file their petitions for a transcript under the provisions of such sections within ten days after such notification but not afterward.

In all other cases where the time for taking an appeal has not expired on the effective date of sections 380(14)-380(25) of this title such defendants or petitioners, if an appeal has been taken, may file a petition under the provisions of such sections and such petition shall not be dismissed because of the failure of such defendants or petitioners to file such petition within the time herein otherwise prescribed, provided such petition is filed within ten days after the effective date of such sections. The trial court in such cases shall notify the court to which said appeal has been taken of the filing and pendency of said petition and shall further notify the appellate court of the decision on the petition when made.

Where an appeal has not been taken upon the effective date of sections 380(14)-380(25) of this title and there remains time within which an appeal may be taken defendant or petitioner may also file a petition under the provisions of such sections within ten days from the effective date hereof.

It is the intent and purpose of sections 380(14)-380(25) of this title that all convicted defendants or petitioners have a period of ten days within which to file a petition under the provisions of such sections after the effective date hereof when the time for taking an appeal has not expired. (1961, Ex. Sess., p. 1934, § 9, appvd. Sept. 15, 1961; 1963, p. 1133, § 8, appvd. Sept. 16, 1963.)

§ 380(22). Appeal from orders of trial court; proceedings on appeal; costs.—Any defendant or petitioner who has filed

a petition under the provisions of sections 380(14)-380(25) of this title, and which petition is denied by the trial court, or if parts of the record ordered to be transcribed are deemed to be inadequate by defendant or petitioner, said defendant or petitioner may within ten days from the order of the trial court file a notice of appeal with the clerk of the trial court from the order denying the petition or from the order deemed inadequate in specifying the parts of the transcript of the evidence to be forwarded to the appellate court on appeal, and such notice of appeal shall specify with particularity wherein defendant or petitioner considers himself aggrieved by the order of the trial court; whereupon the trial judge shall cause to be certified and transmitted to the court of appeals, in cases wherein the punishment is twenty years or less and to the supreme court in cases where the punishment exceeds twenty years, the file of the trial court in said proceedings to obtain a transcript and record, containing the petition and reports made in writing to the court, the court reporter's estimate of the cost of the transcript, and the estimate of the clerk of his fees incident to an appeal, and a certified copy of the order or orders entered by the trial court, and other relevant papers pertaining to the petition, together with an opinion or statement of the trial court, as the trial court shall deem necessary. Upon receipt of said court file by the court of appeals or the supreme court, such court shall proceed to determine the matter of whether or not a transcript of the evidence and a complete record for appeal should be ordered, prepared and filed and paid for as provided for in sections 380(14)-380(25) of this title, and shall render such judgment as in its opinion should have been rendered below or such appellate court may remand such proceedings to the trial court for further proceedings as said appellate court may deem proper.

Such proceedings in the appellate court shall be docketed

and filed as other appeals and shall be considered and disposed of without delay. The defendant filing said petition in the trial court shall have the right to file such brief and argument as he so desires and in like manner the state may file such brief and argument. There shall be no costs or charges attending said appeals. (1961, Ex. Sess., p. 1934, § 10, appvd. Sept. 15, 1961; 1963, p. 1133, § 9, appvd. Sept. 16, 1963.)

§ 380(23). Judgment for costs against petitioner if appeal disposed of unfavorably to him; additional sentence for costs.—In appeals taken under the provisions of sections 380(14)-380(25) of this title, if the judgment or order of the trial court be affirmed or disposed of otherwise unfavorably to the defendant or petitioner, the supreme court or the court of appeals affirming said judgment or order shall enter a judgment for costs against defendant or petitioner, including an amount equal to the fees of the court reporter paid by the state for transcribing the evidence and the fees of the clerk incident to the appeal paid by the state. If said costs are paid by defendant or petitioner or by another in his behalf, such costs shall be paid into the general fund of the state of Alabama. If such costs are not presently paid by the defendant or petitioner or by another in his behalf, execution shall be issued by the trial court upon said judgment against the defendant or petitioner, and if said execution is levied and collected, the proceeds thereof shall be paid into the general fund of the state. If such execution is returned to the trial court "no property found," the defendant or petitioner shall be sentenced additionally by the trial court at hard labor for the county (if the punishment for the offense is a fine or confinement in the county jail or hard labor for the county), or by imprisonment in the state penitentiary (if the punishment for the offense is imprisonment in the penitentiary) for an

additional term to pay said costs at the rate of $5.00 per day. (1961, Ex. Sess., p. 1935, § 11, appvd. Sept. 15, 1961; 1963, p. 1134, § 10, appvd. Sept. 16, 1963.)

§ 380(24). Rules of court regarding transcripts for indigent persons.—The supreme court of the state of Alabama with the advice and consultation with the court of appeals of Alabama is hereby authorized to adopt all needful rules and regulations designed to accomplish the purposes set forth in sections 380(14)-380(25) of this title; such rules and regulations duly adopted shall have the force and effect of law. The circuit courts and other courts of the state having jurisdiction over proceedings under such sections shall have authority to adopt all needful rules and regulations not in conflict with the rules of the supreme court designed to accomplish the purposes set forth in such sections. (1961, Ex. Sess., p. 1936, § 12, appvd. Sept. 15, 1961; 1963, p. 1135, § 11, appvd. Sept. 16, 1963.)

§ 380(25). Appropriation to carry out sections 380(14)-380(25). There is hereby appropriated annually out of the general fund of the state treasury, the sum of fifteen thousand ($15,000) dollars, not to be exceeded in any one fiscal year to pay said court reporters and clerks and to carry out the provisions of sections 380(14)-380(25) of this title. Expenditures from said appropriation are subject before disbursement to the approval of the governor and contingent upon the opinion of the governor of the condition of the state treasury. (1961, Ex. Sess., p. 1936, § 13, appvd. Sept. 15, 1961; 1963, p. 1135, § 12, appvd. Sept. 16, 1963.)

CERTIFICATE OF SERVICE

I, Walter S. Turner, one of the attorneys for the respondent and a member of the Bar of the Supreme Court of the United States, and I, Sarah M. Greenhaw, one of the attorneys for respondent, hereby certify that on this 4th day of August, 1975, we did serve the requisite number of copies of the foregoing Brief and Argument of Respondent and Appendices on the Honorable John L. Lawler, whose address is 903 Commercial Guaranty Bank Building, Post Office Box 1643, Mobile, Alabama 36601, attorney for the petitioner, by mailing said copies to him at the aforesaid address with the postage prepaid.

WALTER S. TURNER
Chief Assistant Attorney General
State of Alabama

SARAH M. GREENHAW
Assistant Attorney General
State of Alabama

250 Administrative Building
Montgomery, Alabama 36130